Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-988

HERMAN H. KRAUSE, ET AL,
Petitioners,

Versus

CITY OF BRUNSWICK, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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Petitioners, Herman H. Krause, et al, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case on September 27, 1979.

OPINIONS BELOW

(1) The opinion of the Supreme Court of Georgia (Appendix p. A-1) has not been reported. (2) The opinion of the lower court sustained (Appendix p. A-2). (3) The Southeastern citation is not yet available.

JURISDICTION

The opinion and judgment of the Supreme Court of Georgia were issued on September 27, 1979. The jurisdiction of this Court is invoked under the Rivers and Harbours Act of 1899, as amended, 33 U.S.C. Sections 401, 403, 407 and 491 (as well as 28 U.S.C., Section 125 (3)).

QUESTIONS PRESENTED

The causeway from the mainland to St. Simons Island, Georgia was built across the salt water, tidal marshes and several rivers. The causeway is about five miles long. The question is who owns the marshes and the tidal basin located between the mainland and St. Simons Island.

The evidence was without contradiction that the State of Georgia had never conveyed to anyone the area of the marshes upon which the causeway was built. Petitioners claimed that the State of Georgia owned the marshes and therefore owned the causeway. The lower courts held that the title to this portion of the marshes was owned "by the County of Glynn or the City of Brunswick or both".

The causeway crosses the Intra Coastal Waterway at two points.

STATEMENT OF THE CASE

1.

St. Simons Island Causeway was originally constructed in 1923 from US 17 Highway on the mainland to St. Simons Island, Georgia. In 1949, the causeway was reconstructed at a cost of two and one-half million dollars and a county bond issue was sold to pay for the construction. A toll was placed on the causeway to generate revenues for the payment of the principal and interest due on the bonds. In February 1979, the last of the bonds and interest were paid in full. However, the County continued to collect the tolls on the causeway and is continuing to this date.

2.

Petitioners herein filed a suit for a declaratory judgment in the lower court to enjoin the collection of tolls on the grounds that neither the City of Brunswick nor the County of Glynn had any right to continue the operation of the causeway because the causeway had been built across the marshes and rivers between the mainland and St. Simons Island and because this area, upon which the causeway was built, was property belonging to the State of Georgia. The petitioners contended and the evidence showed that the State never conveyed any of the marsh lands to either the County or the City, both of whom claim they owned a part of the causeway and both of whom claim they are entitled to part of the proceeds from the collection of tolls.

3.

Petitioners contended that since the State owned the marshes and had not conveyed title to either County or City, therefore the State owned the causeway built upon the marshes. On Motions for Summary Judgment, the trial court held that either the County or City or both owned the causeway. Thus the lower court excluded the State of Georgia as the owner. The Supreme Court of Georgia upheld the lower court in a per curiam decision.

4.

The State of Georgia intervened in opposition to the Petitioners even though the Attorney General of the State of Georgia had previously rendered an opinion that the State of Georgia owned all the salt water marshes along the Georgia coast, consisting of some 400,000 acres.

REASONS FOR GRANTING WRIT OF CERTIORARI

1.

The decision of the Georgia Supreme Court let stand the decision of the lower court which placed title to the salt water marshes in the local government. Such a ruling is not in accord with applicable decisions of this Court where this Court has held that the title to tide waters rest in the appropriate state, as follows:

(a) In the case of *Charles W. Shively vs. John O.A. Bowlby, et al*, 152 U.S. 1, held as follows: §"Lands under tide waters are vested in the sovereign for the benefit of the whole people." (Headnote 2) § Upon the American Revolution, lands under tide water, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States." (Headnotes 2 and 3)

The *Shively* case came out of Oregon. On page two the Court discussed the proposition that the title to lands flowed by the tide were vested in the King and passed either by Grants from the King prior to the American Revolution or were vested in the original States after the American Revolution.

(b) In the case of *Borax Consolidated, Lts., et al vs. City of Los Angeles* 296 US 1, the Court held that the soils under tide water within the original states were reserved to them respectively (page 15) and that the title to the tide land in question passed to California at the time of her admission to the Union in 1850 (page 16). The *Borax* case also held that "The tide land extends to the high water mark" and "by common law the foreshore is confined to the flux and reflux

of the sea at ordinary tides. It is the land between ordinary high and low tide mark, the land over which the daily tides ebb and flow." At pages 23 and 24 as well as the footnotes thereto the Court explains the terms of "spring" tide and "neap" tide, noting from a book entitled "The Tide" written by Marmer, Associate Chief, Division of Tides and Currents, U.S. Coast and Geodetic Survey.

In the *Borax* case the Court finally held on page 27 that mean high water at any place is the average height of *all* high waters at that place over a period of considerable time. (emphasis added).

(c) In the case of *Milton A. Baer vs. Moran Brothers Company* 153 U.S. 287, Headnote 3, U.S. Supreme Court, held that: "Lands alternately covered and uncovered by the tide and between the dry upland and the navigable waters are 'tide lands' ". The *Baer* case was a case involving the mud flats lying on and adjacent to the waters of Puget Sound in the State of Washington.

The Fifth Circuit ruled on this matter in the case of *United States et al vs. Turner*, 175 F.2d. 644, THAT "Navigable waters and soils under them in Alabama belong to the State." (Headnote 1) and § § "Fact that waters flowing submerged lands of island located in body of water in Alabama that was concededly navigable waters were too shallow for actual navigation, did not preclude waters flowing the island from being navigable waters, and, hence, title to submerged lands belonged to state."

This case involved Mobile Bay and the Court made no distinction in determining navigable between the shallows and depts of navigable waters (page 648).

Georgia Supreme Court has held that the fee simple title in the foreshore in all navigable tide waters lies in the State. *State of Georgia vs. Ashmore, et al,* 236 Ga. 401, 413, 224 S.E. 2d. 334. This opinion arose out of a case involving title to the beach of St. Simons Island, Georgia which lies on the opposite side of said island from the salt water marshes in the instant case.

2.

The area involved affects the 400,000 acres, or more, along the entire coast of Georgia of over 150 miles in length, not even including the various property owners fronting on the marshes. The effect of the ruling of the Georgia Supreme Court is to apply a different law to the State of Georgia than has been applied to Oregon, California, Washington and Alabama. The Georgia decision is contrary to the decisions of this Court and this Court should take jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Moreton Rolleston, Jr., Attorney for Herman H. Krause, et al, do hereby certify that I have served all of the parties of record with the within and foregoing Petition for Writ of Certiorari to the Supreme Court of Georgia by mailing a copy of same, by certified mail, to all counsel of record, at their correct mailing addresses, with sufficient postage affixed thereto as follows:

Eugene Highsmith
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J. Thomas Whelchel
Dickey, Whelchel, Miles & Brown
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P.O. Box 1396
Brunswick, Georgia 31520

This 26th day of December, 1979.

Moreton Rolleston, Jr.

APPENDIX I

In the Supreme Court of Georgia.
Decided: SEP 27, 1979

34920. KRAUSE et al. v. CITY OF BRUNSWICK et al.

This court has determined that this is a proper case for application of Rule 59.

Judgment affirmed. All the Justices concur, except Hall and Marshall, J.J., who dissent.

APPENDIX II

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

HERMAN H. KRAUSE, ET AL.
Plaintiffs,

Vs. CIVIL ACTION NO. 18844

CITY OF BRUNSWICK, ET AL.
Defendants.

JUDGMENT

The above styled case having come on regularly for hearing on motions for summary judgment filed by both plaintiffs and defendants, and after hearing same, and all parties having agreed that both motions for summary judgment could be heard today and the time limitations and notice requirements specified by Code 81A-156 having been expressly waived by all parties in open court

It is hereby ordered and adjudged that;

1. The motion for summary judgment filed by plaintiffs is denied

2. The motion for summary judgment filed by defendants is granted on all issues raised by the complaint as amended and the title to the Brunswick St. Simons Island Causeway or

portions thereof, as described in the plaintiff's complaint, is held by the County of Glynn or City of Brunswick or both.

So ordered this 2nd day of March, 1979.

/s/ GORDON KNOX, Jr.
Gordon Knox, Jr.
Chief Judge
Brunswick Judicial Circuit

Supreme Court, U.
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion delivered in the Supreme Court of Georgia is not as yet officially reported, but is appended to the Petition for a Writ of Certiorari (Pet. App. A-1). The opinion was delivered by the Supreme Court of Georgia on September 27, 1979, Opinion No. 34920.

JURISDICTION

The relief sought by Petitioners in the state court proceeding was a declaratory judgment. The Supreme

Court of the United States will not review merely declaratory judgments. *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Association,* 376 U.S. 71 (1928).

At no point in the course of this litigation, prior to their Petition for Writ of Certiorari, have Petitioners raised any federal question based upon the Rivers and Harbours Act of 1899, as amended, 33 U.S.C. Sections 401, 403, 407 and 491. Federal questions relied upon to confer jurisdiction on this Court cannot first be raised on a Petition for Writ of Cretiorari to Supreme Court of the United States. *Spies v. Illinois,* 123 U.S. 131 (1887); *Quimby v. Boyel,* 128 U.S. 408 (1888); *Morrison v. Watson,* 154 U.S. 111 (1894); *Scudder v. Comptroller of New York,* 175 U.S. 32 (1899); *Chapin v. Fye,* 179 U.S. 127 (1900); *Sweringen v. St. Louis,* 185 U.S. 38 (1902); *Rogers v. Clark Iron Co.,* 217 U.S. 589 (1910).

It is essential that at some point in the procedure in state court proceeding for the Petitioners to have raised a federal question to confer jurisdiction. *Murdock v. Memphis,* 87 U.S. 590 (1875); *Church v. Kelsey,* 121 U.S. 282 (1887). The record of proceeding in the state court will reveal a complete absence of any substantial federal question.

QUESTIONS PRESENTED

Petitioners' brief misstates the nature of the legal issue, or issues sought to be reviewed. The issue presented to the trial court and reviewed by the Supreme Court of Georgia is: Do Petitioners, who are residents and taxpayers of the State of Georgia and Glynn County, a political subdivision of the State of Georgia, by virtue of their citizenship alone and who claim no ownership of the Brunswick-St. Simons Causeway in their own right,

have the legal standing in a suit for declaratory judgment to raise the question of who owns the Brunswick-St. Simons Causeway, as between the Respondents, when no contest or dispute existed between the Respondents, the City of Brunswick and Glynn County, as to ownership of the Brunswick-St. Simons Causeway? The second issue presented, in the event Petitioners had such standing and the right to obtain a declaratory judgment is whether the trial court erred in its determination that the Brunswick-St. Simons Causeway is owned by Glynn County or the City of Brunswick or both, and in its failure to declare that the Causeway was owned by the State of Georgia, when the State of Georgia, was not a party to the proceedings in the trial court and did not contest the ownership of the Causeway being vested in the City of Brunswick and/or Glynn County.

STATEMENT OF THE CASE

Petitioners assert in their Petition for Writ of Certiorari that this case is one involving the ownership of 400,000 acres, or more, of marshland located along the entire coast of Georgia. The Petitioners do not claim ownership or title to any of the marshland in question. The only ownership question framed by the litigation in the state court pertains to the Brunswick-St. Simons Causeway, which leads from the City of Brunswick, Georgia to an offshore barrier island known as St. Simons Island, which like the City of Brunswick is located in Glynn County, a political subdivision created by the State of Georgia. The Causeway is a public highway, approximately five miles long and approximately one hundred to two hundred feet wide.

The only parties involved in the state court proceedings were the Petitioners and Respondents. One of the Respondents is the City of Brunswick, a municipal

corporation created and chartered by the General Assembly of Georgia. The other Respondent is Glynn County, a political subdivision of the State of Georgia. The State of Georgia, although named as an original party in the pleading filed with the trial court, was dismissed as a party defendant by the trial court and this ruling was upheld by the Supreme Court of Georgia. *Krause v. City of Brunswick*, 242 Ga. 659 (1978). The ownership of marshland by any other party is not presented for decision in this litigation.

The Brunswick-St. Simons Causeway was at the time the present litigation was filed and is at the present time operated by the City of Brunswick and Glynn County, jointly, as a public toll road. The State of Georgia does not dispute the operation of the Causeway by the City of Brunswick and Glynn County, nor does the State of Georgia claim ownership of the marshland on which the Brunswick-St. Simons Causeway is constructed. In fact, in an Amicus Curiae Brief filed with the Supreme Court of Georgia, the State of Georgia stated that portions of the causeway had been granted by the State to Glynn County, and even if some portions were owned by the State of Georgia, the State has never objected to the operation of this essential public highway.

The present litigation has twice been to the Supreme Court of Georgia. In the first appearance, the Supreme Court of Georgia was called upon to review the trial court's rulings dismissing the State of Georgia as a party and the trial court's refusal to temporarily enjoin the collection of tolls by Glynn County. The Supreme Court of Georgia affirmed both rulings of the trial court. *Krause v. City of Brunswick*, 242 Ga. 659 (1978).

In the second Appearance of this case before the Supreme Court of Georgia, the Supreme Court of Georgia was asked to review the trial court's denial of Petitioners'

Motion for Summary Judgment and granting of the trial court of a motion for Summary Judgment in favor of Respondents. (Pet. App. A-2). The Supreme Court of Georgia affirmed the trial court's rulings. (Pet. App. A-1).

The Motion For Summary Judgment granted to Respondent in the trial court was on all issues raised in the complaint as amended. It must be remembered that this suit was one for declaratory judgment, and that the Respondents at the trial court level questioned the legal standing of the Petitioners to institute such an action. The trial court's granting of the Motion for Summary Judgment established that Petitioners did not have standing to litigate the ownership of Brunswick-St. Simons Causeway. See *Krause v. City of Brunswick*, 242 Ga. 659, 661 (1978).

ARGUMENT

I

THE COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN THE PETITION.

The federal question relied upon to confer jurisdiction on Supreme Court cannot first be raised in Supreme Court of United States. *Spies v. Illinois*, 123 U.S. 131 (1887); *Quimby v. Boyd*, 128 U.S. 488 (1888); *Morrison v. Watson*, 154 U.S. 111 (1894); *Scudder v. Comptroller of New York*, 175 U.S. 32 (1899); *Chapin v. Fye*, 179 U.S. 127 (1900); *Sweringen v. St Louis*, 185 U.S. 38 (1902); *Rogers v. Clark Iron Co.*, 217 U.S. 589 (1910).

It is essential that at some point in the procedure before the state courts the federal question relied upon to confer jurisidiction be presented for decision. *Murdock v. Memphis*, 87 U.S. 590 (1875); *Church v. Kelsey*, 121 U.S. 282 (1887).

At no point in the course of this litigation, prior to thier Petition, have Petitioners raised any federal question based upon the Rivers and Harbours Act of 1899, as amended, 33 U.S.C. Sections 401, 403, 407 and 491.

II

PETITIONERS HAVE NO STANDING TO LITIGATE THE QUESTION OF TITLE TO THE CAUSEWAY.

Petitioners, as citizens and taxpayers, do not claim nor do they have any interest in the ownership of the Brunswick-St. Simons Island Causeway. The issue of ownership of the Causeway has not been disputed by the County, the City or the State, nor has the State opposed the use of the Causeway as a public highway.

III

THE RULING OF THE SUPREME COURT OF GEORGIA DOES NOT INVOLVE TITLE TO GEORGIA'S SALT WATER MARSHES.

This litigation concerns only the Brunswick-St. Simons Island Causeway. The main thrust of Petitioners' argument is that the determination by the trial court that the Causeway is owned by either the City or the County, or both, and the affirmance of that decision by the Supreme Court of Georgia, is tantamount to a holding that title to all marshland along the Georgia Coast is in the local government, and conversely, is not in the State of Georgia. Petitioner's argument must fail for two reasons: (1) The State of Georgia was not a party to the litigation at the time of the Georgia Supreme Court's decision; therefore, the Court could not have properly adjudicated the rights of a party not before it; (2) The State of Georgia does not dispute ownership of the Causeway, as stated in its brief as Amicus Curiae.

> "[I]t [ownership of marshlands] is an interesting legal issue which is simply not presented by the facts of this case. As the Court has already held, there is no controversy between the State, the County and the City as to ownership of the Causeway. Portions of the Causeway have been specifically granted by the State to Glynn County. Even if some portions are owned by the State, the State has never objected to the operation of this essential public highway." (Brief of the State of Georgia as Amicus Curiae, p. 3).

Petitioners misconstrue the effect of the Georgia Supreme Court's ruling. The effect of that ruling is twofold: (1) that no justiciable controversy existed between the parties in the litigation as it appeared below; and (2) that Petitioners herein had no standing to raise and litigate a dispute as to title of other parties, i.e., the State of Georgia, County of Glynn, and City of Brunswick. The jurisdiction of the Court was limited to the parties before it; therefore, its ruling did not dispose of, or in any way effect, any claim the State of Georgia may have to the marshlands along the coast of Georgia, including that portion of the marshland upon which the Causeway is constructed.

For the reasons set out above, it is apparent that the ruling of the Georgia Supreme Court cannot be in conflict with the decisions cited in the Petition, and further, that this case is not one of nationwide or statewide importance.

CONCLUSION

For the reasons stated above, Respondents say that a Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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